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LABAND'S PUBLIC LAW OF THE GERMAN EMPIRE.¹

THIS is a great book. It is a thoroughly thought-out book. It contains an answer to every practical question concerning the constitutional law of the German empire. It should be read and re-read by every student of political science and comparative constitutional law. The author entitles his work *The Public Law of the German Empire*, and is careful to distinguish its character, scope and purpose from political history and political science. So careful is he to do this that an air of juristic anxiety seems to pervade his entire treatment. If the work is at all subject to criticism, it seems to me that it must be from this standpoint, since the present constitutional law of the German empire had its foundation in revolution and a purely legal treatment of it must ignore or, at least, depreciate the influence of elements not working under the forms of independent legal organization. It is possible that this is only an American view of the subject ; but since it is largely for American readers that I undertake this review, I feel it incumbent upon me to justify the criticism by a more minute examination of the author's fundamental propositions. It may, moreover, prove not unbeneficial to our foreign friends to take with us the distant, though perhaps indistinct and distorted, view of their own institutions.

Dr. Laband begins with the declaration that no legal continuity exists between the old German confederation and the North German confederation or its expansion, the present German empire. He declines, therefore, to go farther back in his examination of the subject than to the events just preceding,

¹ Das Staatsrecht des deutschen Reiches. Von Dr. Paul Laband, Professor des deutschen Rechts an der Universität Strassburg. Zweite umgearbeitete Auflage, Band I. Freiburg i. B., Akademische Verlagsbuchhandlung von J. C. B. Mohr, 1888. — Large 8vo, 800 pp.

and immediately leading to, the catastrophe of 1866. (Page 9.) This proposition is an unqualified recognition of the fact that the old German confederation was destroyed, and the ground cleared for the new, by revolution. It is a proposition which cannot be successfully disputed. We have then the advantage of starting together and with the same foot forward. After the first step, however, I am not sure that our paths do not begin to diverge. The next consideration must be in regard to the revolutionary powers, which first made wreck of the old system and then created the new. There can be no question that chief among these was the Prussian government. The declaration of its representative in the Federal Diet at Frankfort, on the 14th of June, 1866: "Prussia looks upon the previous treaty of federation as broken and therefore no longer binding, and will regard and treat it as extinguished,"¹ was the death-knell of the old system; and in all the movements down to the close of the year 1870 it took the initiative in the creation of the new. But there were other elements of power which must be taken into the calculation. What now were these? If I understand Dr. Laband's position correctly, he holds that they were the separate states. (Page 31 ff.) By states he means what we in America understand by the phrase state governments. He indicates no other organization or existence of the states save in their respective governments. He therefore completely ignores the German nation or the German people as one of the revolutionary powers of 1866; and hence, in his construction of the constitutions of 1867 and 1871, he does not admit their participation in the exercise of the sovereign power, and assigns to their representatives in the legislature only an assenting, not a law-making power. (Pages 219 ff. and 542.) It is not easy to reconcile this view with the language used by the Prussian administration itself in preparing the way

¹ "Im Namen und auf allerh. Befehl Sr. Maj. des Königs, . . . erklärt der Gesandte daher hiermit, dass Preussen den bisherigen Bundesvertrag für gebrochen und desshalb nicht mehr verbindlich ansieht, denselben vielmehr als erloschen behandeln und betrachten wird." Schulthess, *Europäischer Geschichtskalender*, 1886, S. 90; Ghillany, *Diplomatisches Handbuch*, Bd. III, S. 208.

for the revolution. As far back as the 15th of September, 1863, it began acting upon the policy of recognizing the claim of the German people to a participation in political and governmental power. Dr. Laband himself cites the memorial of the Prussian ministry of that date, which declared that the most important and essential reform required by existing conditions was the introduction of national, popular representation into the German government. (Page 10.) From that moment forward, the Prussian administration lost no opportunity of representing itself as the leader of the German nation and the German people in the movement to attain a national and, at least, more popular political system. In the proposal for reform which the Prussian representative in behalf of his government laid before the diet at Frankfort, April 9, 1866, the main proposition was the calling of a national convention, whose members should be chosen by universal suffrage and direct election, and before which the plan of a reform of the existing constitution agreed upon by the different state governments should be laid for consideration and ratification. While the commission of the diet was deliberating upon this motion, the Prussian representative sketched the outline of the Prussian plan, and first and foremost stood the demand for "national popular representation" in the new system. When the Prussian representative pronounced in the diet on the 14th of June, 1866, those words which sealed the fate of the old system, he spoke of the unity of the German nation as the chief fundamental power which remained for the construction of the new system.¹ On the 15th of June, Prussia addressed identical ultimata to the governments of Saxony, Hanover and electoral Hesse, demanding demobilization and their assent to the summoning of "the German Parliament."² On the 16th, the Prussian government issued a manifesto to Germany and ordered the Prussian troops to distribute it among

¹ "Indess will Se. Maj. der König mit dem Erlöschen des bisherigen Bundes nicht zugleich die nationalen Grundlagen, auf denen der Bund außer baut gewesen, als zerstört betrachten. Preussen hält vielmehr an diesen Grundlagen und an der über die vorübergehenden Formen erhabenen Einheit der deutschen Nation fest. . . ." Schulthess, Geschichtskalender, 1886, S. 90; Ghillany, Bd. III, S. 208.

² Schulthess, Geschichtskalender, 1866, S. 94.

the people in the states which they might invade. The manifesto contains this significant clause: "Only the basis of the confederation, the living unity of the German nation, is left; and it is the duty of the governments *and the people* to find for this unity a new and vigorous expression."¹ Finally the most significant part of the agreement of the 18th of August, 1866, between the state executives, was that which pledged them to order elections of representatives of the people to a convention-parliament, which body should consider a constitution to be laid before it by the body of representatives of the state governments and arrive at an agreement in regard to the same. (Page 17.) Dr. Laband touches upon all of these points, but he does not appear to give them any weight whatsoever in his account of the origin of the constitution or his construction of its character. His position seems to be, that after the dissolution of the old confederation nothing remained but the governments of the separate states. The princely heads of these governments formed the agreement of August 18, and appointed their respective representatives to the body which was to draft the constitution. The legislative branch of these governments enacted the law of suffrage and elections for the choice of the popular representatives from each state to the convention-parliament. These elections were held under the governmental organization of each state. Finally, the constitution agreed upon by the princely representatives and the convention-parliament was ratified by the legislative power of each state. Therefore the state governments, in union, formed the new constitution. They are, therefore, the sovereign power upon which it rests, and through their organ in the constitution, the Federal Council (*Bundesrath*), they continue to exercise the sovereign power.

This is certainly a juristic view of the subject. It seems to me excessively juristic. It seems to me to ignore too far the revolutionary origin of the constitution, and to attach itself too minutely to existing legal forms and organizations. We did the

¹ "Nur die Grundlage des Bundes, die lebendige Einheit der deutschen Nation, ist geblieben, und es ist die Pflicht der Regierungen *und des Volks*, für diese Einheit einen neuen lebenskräftigen Ausdruck zu finden." Ghillany, Bd. III, S. 210.

same thing for three-quarters of a century in the construction of our public law, and for doing this we paid a bitter penalty. I do not know how much aid or countenance the Prussian government secured from the German people in the war of 1866 through its promises of reform, its proclamations and manifestoes. It is possible that they regarded these as mere phrases and did nothing or omitted nothing upon their part, which could be regarded as establishing an obligation. Nevertheless we cannot exactly comprehend why, of the three organizations which conspired to form the constitution of 1867, the parliament, which represented the German people as a whole, is assigned to the position of a merely assenting body, while the state executives and legislatures are declared to be the real constitution-making powers. The actual procedure was as follows. Count Bismarck laid the draft of a constitution before the body of princely representatives. After they reached an agreement in regard to it, it was sent to the parliament of popular representatives, which changed the instrument in some forty points and adopted it in the resulting form. It was then returned to the body of princely representatives, who accepted the changes. It was then sent to the state legislatures, all of which adopted it without change. It is difficult for an American to see, in this procedure, the reason for denying to the parliament any real constituent power, while such power is accorded both to the body of princely representatives and to the state legislatures; and when, finally, the state legislatures are assigned, in the state systems, to the position of mere assenting bodies (page 87), *i.e.* councils *in pleno*, on the ground that the systems are monarchic, and consequently the real constitution-making body is ultimately found to be the assembly of princely representatives, the American student of this subject becomes hopelessly puzzled. He may not be able to detect and point out a fallacy, but his political conscience feels that there is sophistry somewhere. My feeling is, that the error lies in construing a public law originating in revolution upon a too exclusively juristic interpretation of its principles. Political history, political science, public policy and even political ethics demand

consideration in the construction of such a constitution ; and if they are not considered, if an exclusively juristic method of reasoning is followed, the construction will run into lines which contradict natural and existent conditions, both in fact and in their relations.

One of the points at which this result becomes most dangerous in a federal system, such as the German empire or the United States, is the question of the relation of the union to the separate states. Dr. Laband has worked himself free from the old notion, represented most prominently in the German literature of political science by Waitz, that there is a division of the sovereignty in such a system between the union and the states, and comes out clear upon the impregnable ground that the sovereignty is indivisible and unlimited in the union. (Page 54.) The only standpoint from which this view can be attained is that of the publicist, and I was encouraged to expect that the whole subject of the relation between the states and the union would be treated mainly from that standpoint. I must, however, confess to some disappointment in regard to this. The learned author betrays much anxiety to preserve to the separate states the character of real states, while he denies to them the possession of any sovereign power. The jurist comes again to the front, and rescues the state from the category of organizations having only derived powers by the proposition that the distinguishing characteristic of the state in general is not sovereignty, but only the power to command and compel obedience to its commands from the free subjects of the state. (Page 64 ff.) It seems to me that this distinction will not hold. If this power to command and to compel obedience be underived and independent, then it is sovereignty pure and simple. If on the other hand it be in any sense derivative, then the criterion of distinction which Dr. Laband sets up between the relation of the states to the union and that of the municipal divisions of the state to the state largely breaks down, since these municipal divisions have also the power to command and compel obedience to their commands from the free subjects of the state, and in their case this is clearly a vested power. If sover-

eignty in the federal system be exclusively in the union, then it seems to me that this makes the union the only real state, and that the only distinction which remains between the separate states and the municipalities lies in the fact that while the municipalities derive their authority from the states in a positive and definite manner, the states derive their power from the union in a permissive and general manner. To be completely scientific, then, in our nomenclature and emancipate ourselves completely from the power of customary phrases, we should give the name *state* only to the union and find some other term to designate its members. In America we have already the suitable title — *commonwealth*.

The most important point in any constitution, after the question of its original establishment, is the provision for amendment or revision; since it is in this provision that the sovereignty gives itself a permanent form of organization. The German constitution presents great difficulties to the general student upon this point, and it was with much interest that I approached Dr. Laband's explanation of the provision. I regret to say that I did not receive all the help which I had anticipated. The difficulty lies in the fact that the same organs which make statute law, as we say, make also constitutional amendments. The process in the two cases is also the same. The only distinction is in the difference of majority required. Article 78 of the constitution reads as follows :

Veränderungen der Verfassung erfolgen im Wege der Gesetzgebung. Sie gelten als abgelehnt, wenn sie im Bundesrathe 14 Stimmen gegen sich haben.

Diejenigen Vorschriften der Reichsverfassung, durch welche bestimmte Rechte einzelner Bundesstaaten in deren Verhältniss zur Gesamtheit fest gestellt sind, können nur mit Zustimmung des berechtigten Bundesstaates abgeändert werden.

That is to say, the legislature of the empire may change the constitution generally, unless 14 of the 58 voices in the Federal Council (or state chamber) object; but in certain cases, *viz.*, when the change is in regard to the rights of a state, guaranteed in the constitution, the voice of that state must not be

found in the negative. In other words, in such case the single voice of the state so affected may successfully veto the project.

The great question of hermeneutics in regard to this subject is : How shall a project of simple legislation be distinguished from a proposition to amend the constitution, and how shall a proposition to amend generally be distinguished from one to amend those specific clauses guaranteeing certain rights and powers to a particular state of the empire ? The naïve reply would be : By the content of the project or proposition. But suppose it should not be clear from the content to which class the particular proposition belongs ; or suppose a conflict of opinion, springing either from such unclearness or from mere party prejudice, should arise in the legislature : how shall a decision upon this point be reached ?

A complete system must furnish an organ for the determination of this question. There is no express provision of the German constitution which does so. It becomes, therefore, a matter of implication. Dr. Laband appears to me to give two answers to this question and the one seems to contradict the other. On page 260, in treating of procedure in the Federal Council, he affirms :

Veränderungen der Verfassung sind abgelehnt, wenn sie 14 Stimmen gegen sich haben. (Art. 78, Abs. 1.) Die Vorfrage, ob der Gesetzesvorschlag eine Veränderung der Verfassung enthält oder nicht, wird durch diese Vorschrift nicht berührt ; denn diese Vorfrage betrifft nicht eine Abänderung, sondern eine Auslegung der Verfassung. Sie wird daher durch einfache Mehrheit entschieden.

If I correctly comprehend this statement, the principle here advanced by Dr. Laband is that the question whether a given proposition is a project of law simply or of constitutional amendment, is to be decided by a simple majority of the votes in the Federal Council. This preliminary question, he says, is not a question of constitutional amendment, but of constitutional interpretation. It seems to me that this is a decidedly radical view. It enables a bare majority in the Federal Council and Imperial Diet, by declaring the project of constitutional change

to be one of ordinary law, to defeat the veto power which Prussia, through her 17 voices in the Federal Council, may exercise against changes in the constitution. A change in the constitution may of course be effected without changing the wording of the instrument. Dr. Laband not only admits this possibility, but cites examples in the legislation of the empire where this has actually been done. (Page 347 ff.) It is not at all unthinkable that in a moment of strong Guelphish opposition to Prussia, a majority in the legislature might become so blinded by prejudice as really to consider a proposition weakening the constitution of the empire, but not changing the text, to be simply a project of law. It seems to me that, in view of the part taken by Prussia in the creation of the empire, and of the fact that she makes out about two-thirds of the empire both in territory and in population, there should be no legal means invented whereby, through the process of questionable interpretation, changes in the constitution could be effected without her consent.

On the other hand, the principle that the hermeneutical question shall be determined by a mere majority vote in the Federal Council and Imperial Diet makes the guaranty of the constitution, that the specially recognized rights of certain states shall not be changed without their own consent, insecure. It is very desirable that the exceptional rights of the South German states should be abolished ; and it is not at all improbable that a long continued and decidedly unreasonable resistance to such change in the manner prescribed in the constitution, might influence the minds of a majority of the members of the legislature to turn the flank of the opposition by so deciding the preliminary question of interpretation as to accomplish this result. I cannot help feeling that such a procedure would violate the constitution and would engender a bitterness of feeling as hostile to the further development of the empire as is the present status. It would furnish a temptation which ought not to exist.

But the passage above quoted does not contain all that the author has to say on this question. Discussing *Die Ausferti-*

gung der Reichsgesetze by the Emperor — *i.e.* the act of furnishing the bills passed by the Federal Council and Imperial Diet with the formula of command — Dr. Laband writes :

Die Eingangsworte der Gesetzesurkunde lauten : “ Wir . . . verordnen im Namen des deutschen Reiches, *nach erfolgter Zustimmung des Bundesrathes und des Reichstages*, was folgt.” Die Ausfertigung des Gesetzes enthält also die kaiserliche Versicherung, dass das Gesetz die Zustimmung des Reichstages und Bundesrathes erhalten hat, d. h. den Anforderungen der Reichsverfassung gemäss zu Stande gekommen ist. Sie setzt demnach eine Prüfung des Weges, den das Gesetzgebungswerk zurückgelegt hat, voraus. Dem Kaiser als solchem steht zwar ein Veto gegen das Reichsgesetz nicht zu ; aber der Kaiser hat das Recht und die Pflicht, zu untersuchen, ob das Gesetz in verfassungsmässiger Weise die Zustimmung des Reichstages und Bundesrathes und die Sanction des durch den Bundesrath vertretenen Reichssouveräns erhalten hat. Er hat daher insbesondere zu prüfen, ob im Bundesrathe die Abstimmung nach den im Art. 7 der Reichsverfassung aufgestellten Regeln und ob die Beschlussfassung den Bestimmungen der Art. 5, 37 oder 78 der Reichsverfassung gemäss erfolgt ist ; ob dem Gesetz, falls es *jura singulorum* berührt, der davon betroffene Bundesstaat zugestimmt hat ; ob der Reichstag und Bundesrath die Gesetzesvorlage den bestehenden Vorschriften gemäss behandelt haben ; ob zwischen den Beschlüssen beider Körperschaften völlige Uebereinstimmung besteht u. s. w. Wenn diese Prüfung zu einem negativen Ergebniss führt, so hat der Kaiser nicht bloss das Recht, sondern die Pflicht, die Ausfertigung zu versagen, bis der Mangel gehoben ist. Auch wenn der Kaiser irrthümlich zu dieser Ansicht gelangen sollte, so gilt seine Entscheidung, denn es gibt keine höhere Instanz, welche ihn zur Ausfertigung des Gesetzes anhalten könnte. Es ist daher *thatsächlich* die Möglichkeit gegeben, dass der Kaiser, indem er die Ausfertigung des Gesetzes aus einem formellen Grunde versagt, ein Veto ausübt. Eine politische Gefahr ist in diesem Satz nicht zu finden ; man würde völlig seine thatsächliche Bedeutung verkennen, wenn man daraus den Schluss ziehen wollte, dass es in die Willkür des Kaisers gestellt sei, ob er ein Gesetz ausfertigen wolle oder nicht. Die Rücksicht auf den Bundesrath und auf den Reichstag, auf die öffentliche Meinung und auf das eigene Ansehen machen es ganz unmöglich, dass der Kaiser die ihm übertragene Befugniß widerrechtlich missbrauche.

Erkennt der Kaiser an, dass das Gesetz in tadelloser Weise den Vorschriften der Reichsverfassung gemäss zu Stande gekommen ist, so ist die Ausfertigung desselben seine verfassungsmässige Pflicht.

Wenn der Kaiser die Ausfertigung ertheilt, so wird damit in formell unanfechtbarer und rechtswirksamer Weise constatirt, dass das Gesetz verfassungsmässig zu Stande gekommen ist. [Page 549 ff.]

I have cited this passage in full because it seems to me to contain the most important proposition of the entire work. If I comprehend it correctly, the principle here enunciated by Dr. Laband is that the Emperor, under the prerogative conferred upon him in article 17 of the constitution¹—that of putting the bills passed by the Federal Council and Imperial Diet into the form of commands,—has the power to examine the contents of the bill and to determine therefrom whether it is a simple project of law or an amendment of the constitution, and to refuse to confer the force of law upon any bill which shall not have been passed by the majority prescribed by the constitution in accordance with its character. Dr. Laband says that the Emperor not only has the power to do this, but is constitutionally bound to do it. On the other hand, he is constitutionally bound to give a bill the force of law when he is convinced that it has been passed in the manner prescribed for such bills by the constitution. Finally, it is asserted that the constitutionality of the Emperor's act cannot be called in question by any other power, magistrate or person in state or empire.

I think this is good political science, but questionable jurisprudence. From the standpoint of political science, we should be obliged to pronounce the German constitution faulty and incomplete, if it did not provide some organ for determining whether a proposed bill bore the character of a law simply or that of a constitutional amendment; and I do not see how this great power could be intrusted to safer hands than those of the Emperor. In view of the relation of the Emperor to the German people and nation, to the princes of the several German states and to the state of Prussia, it cannot well be doubted that Dr. Laband's conclusion, that this great responsibility will be better fulfilled by the Emperor than by any other organ of the constitution, is correct. But the derivation of this great power

¹ The portion of art. 17 which confers this power reads: "Dem Kaiser steht die Ausfertigung und Verkündigung der Reichsgesetze . . . zu."

from the prerogative of furnishing the bills passed by the legislature of the empire with the formula of command, is, to say the least, an extraordinary bit of interpretation. This prerogative is usually regarded as a ministerial power and the exercise of it as a purely formal act. The executive usually goes no farther in his examination of a bill passed by the legislature, preliminary to its proclamation as law, than the attestation of the proper officers of the legislative body to the fact of the passage. It is certainly then a little startling to find the claim advanced that the guardianship of the constitution is contained in this power.

It seems to me that the German constitution really makes no provision to meet this question. The framers of this constitution were men who had had little experience in such work, and they naturally left many important points uncovered. It is the problem and the duty of the interpreter to make as much use of the principle of reasonable implication as possible in the building up of the body of public law upon the basis of the constitution; but when so great a jurist and publicist as Dr. Laband presents two different and apparently contradictory¹ interpretations of the constitution, then surely it is time to acknowledge that the constitution is incomplete upon this point and seek for its amendment. It would be interesting to know if this question has ever come to issue between the Emperor and the legislature, and if the legislature has acquiesced in the view that the Emperor has the power to pass upon the constitutionality of its

¹ I say *apparently* contradictory, because it is conceivable that a simple majority of the Federal Council might decide, in first instance, that a bill involves no change of the constitution, and the Emperor might decide, in second instance, that the bill does involve such change and therefore requires more than a simple majority of voices; and Dr. Laband may mean to construe the constitution in precisely this manner, so that the decision of the Council is of no effect if the Emperor takes an opposite view and refuses to promulgate the new law. But again Dr. Laband may mean that the decision of the Federal Council, if the question is directly brought to vote, prejudices the Emperor's decision, and that the Emperor is to investigate the question only in case the Federal Council has omitted to declare its view. He has certainly failed to make clear the relation existing in his mind between the Council's right to interpret the constitution and the right of the Emperor to do the same thing. On page 260, where this power is attributed to a simple majority of the Federal Council, von Rönne is cited (in a foot-note) as holding the same view. But von Rönne holds that the decision of the Council (and Diet) is *final*.

acts under his prerogative to clothe them with the formula of command. It would also be most highly interesting to know if the supreme judicial power of the empire has taken any position upon the subject. Dr. Laband does not inform us as to either of these points, and we conclude therefore that the problem has not yet received a practical solution.

The questions of sovereignty and of the relation of the states to the empire once behind him, Dr. Laband has a fairer field for his strict juristic methods. His definitions are admirable. His analyses are careful and exhaustive. His conclusions are satisfactory. He has certainly done a great work in the development of the science of public law in general and of the public law of Germany in particular. His task has been one of great difficulty and of great responsibility — of great difficulty on account of the extreme complexity of the relations in the German system, and of great responsibility because of the authority attributed in the German practice to the scientific commentators upon the constitution and the laws. The publicists and jurists not only of Germany but of the world owe him a great scientific debt, and should give generous expression to their sense of obligation.

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